

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-20688

To be argued by
DAVID L. BIRCH

UNITED STATES DISTRICT COURT
FOR THE SECOND CIRCUIT

-----X
ELMORE CUNNINGHAM, ERNEST ISON III,
EDGAR WILLIAMS and CHARLES GOLL,
and All Others Similarly Situated
at Auburn Correctional Facility,

Appellants,

-against-

BENJAMIN WARD, Commissioner, New York
State Department of Correctional
Services, ROBERT J. HENDERSON,
Superintendent, Auburn Correctional
Facility and Their Subordinate
Employees,

Appellees.
-----X

BRIEF FOR APPELLEES

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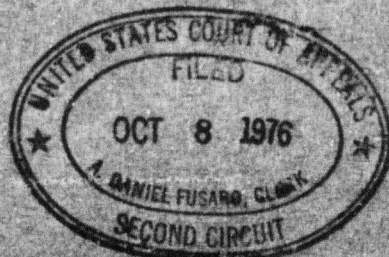


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Services, ROBERT J. HENDERSON,	:
Superintendent, Auburn Correctional	:
Facility and Their Subordinate	:
Employees,	:
Appellees.	:

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BRIEF FOR APPELLEES

Statement

Plaintiffs-appellants appeal from a Memorandum Decision and Order of the United States District Court for the Northern District of New York (Port, J.) dated January 20, 1976 dismissing sua sponte plaintiffs' civil rights complaint.

Question Presented

Does this Court lack jurisdiction over the appellees since they were not served with process and have not appeared in this action?

Facts

Appellants, inmates of Auburn Correctional Facility, instituted this action in the United States District Court for the Northern District of New York alleging a deprivation of their civil rights. The complaint and a Memorandum Decision and Order dismissing the complaint were both filed on January 23, 1976 (Appendix, p. 2). Defendants were never served with process, see appellants' brief p. 2 and, therefore, never replied to the allegations in the complaint. Plaintiffs' major allegation is that they had a right to a full hearing pursuant to the procedures set forth in Wolff v. McDonnell, 418 U.S. 539 (1974) before a minor loss of privileges could be imposed on them. Plaintiffs sought declaratory and injunctive relief and requested the cost of the action.

The District Court (Port, J.) dismissed the complaint sua sponte on the ground that the procedures set forth in Wolff v. McDonnell, supra were not required where the minor punishment alleged by plaintiffs was imposed (Appendix, pp. 45-47).

ARGUMENT

THE COURT LACKS PERSONAL JURISDICTION
OVER THE DEFENDANTS-APPELLEES SINCE
THEY HAVE NOT BEEN SERVED WITH PROCESS
AND HAVE NOT APPEARED IN THIS ACTION.

The docket sheet indicates,* and appellants admit, that no summonses were issued or served on any of the defendants. No reply on the part of the defendants was requested or required. The District Court dismissed the case sua sponte after granting plaintiffs leave to proceed in forma pauperis.

Thus, it is clear that the defendants are not properly before this Court (F.R.C. P. 4). The Attorney General was not requested to and did not waive such service by a general appearance. Indeed, he would not be in a position to do so unless authorized.

While there was no jurisdiction, it should not be overlooked that the sua sponte action of Judge Port was on the merits in full conformity with Wolff v. McDonnell, 418 U.S. 539 (1974). As appellant's brief acknowledges, the procedural protections set out in Wolff were required only when "loss of good time may result or 'when solitary confinement is at issue.'" (App. br. p. 4). The action of the

* Appendix, Page 2.

District Judge was in the interest of judicial economy. The embellishment of the allegations of the complaint appearing in the brief should be the subject of a superseding complaint with proper due service.

CONCLUSION

THE APPEAL SHOULD BE DISMISSED.

Dated: New York, New York
October 7, 1976

Respectfully submitted,

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STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

MAGDALINE SWEENEY , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for Appellees
herein. On the 8th day of October , 1976, she
served the annexed upon the following named person :

MICHAEL C. FAHEY, ESQ.,
Acting Project Director
BRONX LEGAL SERVICES CORP. C.
579 Courtlandt Avenue
Bronx, New York 10451

attn: Steve Cahner, Esq.

Attorney in the within entitled appeal by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by
the Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by him for that purpose.

Magdaline Sweeney

Sworn to before me this
8th day of October , 1976

David P. Biny
Assistant Attorney General
of the State of New York